

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: MARSHALL-SCHMIDT, LYNDA
DAM 727

AAD NO. 12-002/DE

DECISION AND ORDER

Jurisdiction

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R. I. General Laws §42-17.7-1 et. seq.); the *Administrative Procedures Act* (R. I. General Laws §42-35-1 et. seq.); and the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* (“AAD Rules”).

Burden of Proof/ Standard of Review

The Parties agreed prior to the Hearing that because the Respondent, Lynda Marshall-Schmidt (hereinafter “Respondent”) appealed the Notice of Violation (“NOV”) issued April 9, 2012 by the Rhode Island Department of Environmental Management (“DEM”), Office of Compliance and Inspection (“OC&I”), the burden of proof rests with OC&I to prove, by a preponderance of the evidence, the allegations in the NOV.

Facts and Travel

A Hearing was conducted on December 16, 2014. Prior to the Hearing, the OC&I submitted its Prehearing Memorandum plus a Supplement and Second Supplement to its Prehearing Memorandum. The Respondent did not file a Prehearing Memorandum. The OC&I filed a Post-Hearing Memorandum. The Respondent did not file one. The OC&I was represented by Joseph LoBianco, Esquire. The Respondent represented herself.

This matter was commenced on or about April 9, 2012 when the OC&I issued a Notice of Violation (“NOV”) to Respondent for violations of the DEM Dam Safety Regulations. Prior to

the commencement of the hearing, the Respondent stipulated to the following facts as set forth in OC&I's Prehearing Memorandum:

- (1) Respondent, Lynda Jean Marshall-Schmidt, is owner of what is commonly referred to as the Bowish Lower Reservoir Dam (the "Dam").
- (2) The Dam is identified as State Dam ID No. 727 and is located within the Town of Gloucester.
- (3) On or about October 19, 2009, a dam safety inspector conducted an inspection of the Dam and reported on the condition and hazard classification of said Dam.
- (4) The Dam has been classified by the DEM as High Hazard.
- (5) On April 9, 2012, the DEM issued a Notice of Violation ("NOV") to the Respondent in regard to several maintenance issues and safety concerns associated with the Dam.
- (6) The Department has jurisdiction over the Respondent pursuant to R. I. General Laws §42-17.1-1, et. seq. and §46-19-1, et. seq.

At hearing, Paul W. Guglielmino, a Senior Sanitary Engineer employed by the DEM to oversee its Dam Safety program, testified about the condition of the dam, the violations revealed by the inspection of the dam conducted by Pare Corporation in 2009, and about the Respondent's failure to complete and submit a dam registration form. Testimony was also elicited at the hearing from the Respondent.

Testimony of Paul W. Guglielmino

Mr. Guglielmino is a Senior Sanitary Engineer employed by the DEM for many years. He testified that Dam 727 was classified as a High Hazard Dam. (TR. Pg. 19). A copy of the Deed to the property was entered as OC&I Exhibit 1 – Full. Ms. Marshall-Schmidt also stipulated that she was the owner of the Dam. Dam 727 has been classified as a "High Hazard" dam by the DEM. (TR. pg. 19). The *Rules and Regulations for Dam Safety* define "High Hazard" dam as "a dam where failure or misoperation will result in a probable loss of human life." Mr. Guglielmino

explained, "So it's basically if the dam fails catastrophically suddenly, there's a probable loss of human life downstream from the release of the water. It does not relate to the current condition of the dam." (TR. pg. 20).

Mr. Guglielmino further testified that the dam was inspected by Pare Corporation on October 19, 2009 at the request of the DEM and that Pare concluded that the dam is in "poor to unsafe" condition. (TR. pgs. 24-27) OC&I Exhibit 2 – Full. Mr. Guglielmino testified that Pare's "general findings were essentially a leaking low level outlet, heavily overgrown and eroded slopes of the dam, ponded downstream area, and undermining at the primary spillway retaining walls and central pier, and scour along the primary spillway crest and concrete approach." (TR. pgs. 27-28) OC&I Exhibit 2 – Full. Mr. Guglielmino further testified that he not only agrees with Pare's conclusions, but that he reached an independent conclusion based on the evidence that Dam 727 is unsafe. (TR. pg. 28).

The Dam Safety Regulations define "Unsafe Dam" in pertinent part as follows:

"Unsafe Dam" means the condition of a regulated dam, as determined by the Director, is such that an unreasonable risk of failure exists that will result in a probable loss of human life or major economic loss. Among the conditions that would result in this determination are: excessive vegetation that does not allow the Director to perform a complete visual inspection of a dam, excessive seepage or piping, significant erosion problems, inadequate spill way capacity, inadequate capacity and/ or condition of control structure(s) or serious structural deficiencies, including movement of the structure or major cracking.

At hearing, Mr. Guglielmino testified that he considers Dam 727 unsafe "because there was excessive vegetation on the dam that did not allow a proper visual inspection, the low level outlet had unknown operability and there was debris in the spillway channel." (TR. pg. 30). He further explained that it is important to clear vegetation around a dam because the "inspections that we do...[are] visual inspection[s]. So if there's so much vegetation that you can't properly visually inspect the dam, then we can't properly determine the condition of the dam in some areas." He

also explained that it is important to keep a dam's spillway clear because:

...debris in the spillway may inhibit flow in the spillway. This dam is an earthen dam, what we consider an earthen dam, and if the flow was such that the capacity of the spillway was exceeded and water rose to the top of the dam, it could potentially go over the dam and flow in areas where water is not supposed to flow which is basically on top of the earthen dam. If there was enough flow and enough velocity, it could cause the dam to begin eroding and ultimately fail. So it's important to keep the spillway as open as possible.

(TR. pgs. 30-31).

Mr. Guglielmino then testified about a dam's low level outlet. Mr. Guglielmino stated that a low level outlet is:

... a valve or a slide gate... that would allow the water in the pond to basically drain. So the outlet is at the base of the dam. In this case, I believe there's a slide gate with a stem that would go up to the top of the dam, top surface of the dam. There's a little, like a shack or little shed and within that shed there's a mechanism that you would turn and it would raise and lower the gate. So if you raise it, it exposed the pipe and then the water drains out the pipe which is through the base of the dam and it comes out the other side of the dam.

(TR. pg. 32-33).

He further testified that he wouldn't actually test a low level outlet himself, but would ask the owner to do it during the inspection... if the owner were comfortable doing it and were pretty sure it actually worked. (TR. pg. 33).

When asked directly why it is so important to ensure that a dam's low level outlet is functional, Mr. Guglielmino explained as follows:

We have three main reasons why we consider it important. One is if there is a safety concern with the dam, for example, if there was seepage that we were concerned with, you could open the valve, lower the water behind the dam and hopefully lower it such that the seepage doesn't occur and protect the dam as much as possible. Another one is if there's a large rain storm anticipated, we tell the dam owners they can open the valve to allow the water behind the dam to be lowered to allow more storage capacity for the future storm. And also if the dam needs to be inspected below the water line, the valve – if you open the valve, it allows the water to be dropped down so the dam can be inspected.

(TR. pgs. 31-32).

The Respondent, Ms. Marshall-Schmidt, then cross-examined Mr. Guglielmino. She

questioned Mr. Guglielmino about his comments regarding the possible loss of human life and asked if that wasn't a rather drastic statement. Mr. Guglielmino noted that the classification is based on the GZA Report of a worst case scenario of the water being at the top of the dam and it failed suddenly. Mr. Guglielmino responded to Ms. Marshall-Schmidt's questioning:

[T]hat's a hazard classification as a high hazard dam, and that's based on that report that we would have sent you with the registration letter, the one that was completed by GZA Geo Environmental, Inc. ("GZA") at the request of DEM. So they looked at the dam and they used an engineering model and engineering judgment and they – the scenario is that is the water was to the top of the dam before it failed and then it failed suddenly, it's like a worst case scenario or a really bad case scenario and then they looked at where the water went, there was release from the pond, and they had – I believe there's a dam that's a couple or one downstream, the Clark dam. And right below the dam, there's residences right immediately below the dam, and that was a concern. And then there was a dam that's just over the Rhode Island border, I think, in Connecticut where there are houses right on the dam. So I think those were the two areas where there would be the probable loss of life because the residences are so close to the – either right below the dam or right on the dam. That was a concern.
(TR. pg. 37).

Mr. Guglielmino, therefore, pointed out that if Dam 727 were to fail, it could cause those two downstream dams to fail in a domino effect-like fashion. On redirect, Mr. Guglielmino further noted that in its report, GZA concluded that if Dam 727 were to fail, the possible worst case scenario would be that, "There would be probably loss of life." (TR. pg. 47) and OC&I Exhibit 5 – Full, pg. 4.

Ms. Marshall-Schmidt then continued her cross-examination of Mr. Guglielmino and attempted to demonstrate the entire dam might not be on her property and therefore she would not be responsible for the NOV. But, she failed to present any evidence regarding the boundary lines or ownership of Dam 727. The following colloquy with Mr. Guglielmino demonstrates the lack of evidence:

- Q. When Pare did their survey thing, when Pare did their survey, did they have, I guess, the boundaries of my property?
- A. **No. They were just hired to inspect the dam regardless of whose property it's on, it doesn't matter to them.**
- Q. Okay. If I know that mechanism, I don't know what to call it, is on my property, but on the other side of the road, I don't know if that's mine, does that fall into play anywhere with because I own the mechanism, does that mean I own the whole thing even if it weren't on my property?
- A. **If it's not on your property, then I would say you don't – you unlikely own it. If it's not on your property, then I would say you probably don't own it, do not own it.**
- Q. How do I determine that? Do a survey? He's pulled – John Tillinghast has pulled up all the survey sticks or whatever, the boundary lines.
(TR. pg. 51).

The DEM, through its counsel, then offered to stipulate that it would only look to enforce the NOV as to whatever portions of the dam are on Ms. Marshall-Schmidt's property. Ms. Marshall-Schmidt agreed. (TR. pg. 57). The DEM did not assess any Administrative Penalties against the Respondent. The DEM has taken the position that it wants the Dam repaired and not penalize the Respondent for having issues with the Dam. (TR. pg. 13).

No further evidence was introduced. Ms. Marshall-Schmidt rested. The Hearing concluded.

Analysis

Based on the totality of the evidence presented, I find that the OC&I has satisfied its burden of proving, by a preponderance of the evidence, the violations cited in the subject Notice of Violation.

Findings of Fact

- (1) The Department has jurisdiction over the Respondent pursuant to R.I. General Laws §42-17.1-1 et seq. and §46-19-1 et. seq.
- (2) Respondent, Lynda Jean Marshall-Schmidt, is the owner of what is commonly referred to as the Bowish Lower Reservoir Dam (the "Dam").
- (3) The Dam is identified as State Dam ID No. 727 and is located within the Town of Glocester.
- (4) On or about October 19, 2009, a dam safety inspector conducted an inspection of the Dam and reported on the condition and hazard classification of said Dam.
- (5) The Dam has been classified by the DEM as High Hazard.
- (6) On April 9, 2012, the DEM issued a Notice of Violation to the Respondent in regard to several maintenance issues and safety concerns associated with the Dam.
- (7) In a certified letter dated December 11, 2011, which was delivered December 12, 2011, the DEM forwarded a registration form for Dam 727. The Respondent was required to complete and return the form to the DEM by December 26, 2011.
- (8) The Respondent, as the owner of Dam 727, has not provided a fully completed Dam Registration Form to the DEM.
- (9) Dam 727 is in an unsafe condition.
- (10) The DEM considers Dam 727 unsafe for the following reasons:
 - (a) Excessive vegetation that prohibits a proper inspection,
 - (b) Debris obstructing the flow in the spillway,
 - (c) Unknown operability of the low level gate.
- (11) The DEM did not assess any Administrative Penalties against the Respondent.

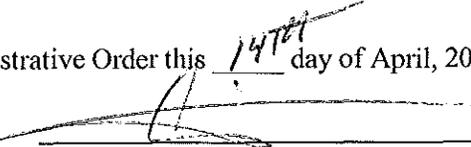
Conclusions of Law

- (1) The Department has jurisdiction over the Respondent pursuant to R.I. General Laws §42-17.1-1 et seq. and §46-19-1 et. seq.
- (2) Respondent violated Dam Safety Regulation Rule 4A, which requires the owner of a high hazard dam to maintain the dam in a safe condition,
- (3) Respondent violated Dam Safety Regulation Rule 8, which requires the owner of a dam to provide a fully completed registration form to the DEM,
- (4) The issuance of the NOV was appropriate and is hereby **AFFIRMED and UPHELD**.

Wherefore it is hereby **ORDERED** that;

1. Respondent's Appeal is hereby **Denied and Dismissed**.
2. The Notice of Violation is **Affirmed and Upheld**.

Entered as an Administrative Order this 14th day of April, 2015.



David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Status Conference Order to be forwarded by first-class mail to Lynda Marshall-Schmidt, 122 Arland Drive, Pawtucket, RI 02861; Donna Spicer, 2388 Dustin Circle, Spring Hill, FL 34608; via interoffice mail to Joseph J. LoBianco, Esquire, DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _____ day of April, 2015.

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.